IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1627

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

against

LEON NEWSOME,

Respondent.

REPLY BRIEF FOR PETITIONER

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Petitioner, Pro Se
Office & P. O. Address:
Two World Trade Center
New York, N. Y. 10047
Tel. No. (212) 488-3394

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

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Respondent, in his brief, pp. 5-6, sets forth the implausible reasoning of the Second Circuit, in continuing to permit the challenge in the federal court of state guilty-plea convictions, which is directly contrary to the opinions of this Court in *McMann* v. *Richardson,* 397 U.S. 759 (1970) (reversing the Second Circuit) and *Tollet* v. *Henderson,* 411 U.S. 258 (1973). Clearly, the Ninth Circuit holding in *Mann* v. *Smith,* 488 F. 2d 245 (9th Cir. 1973), *cert. den.* —— U.S. ——; 42 U.S. Law Week 3469 (Feb. 19, 1974) is in line with the above opinions of this Court. The non-use by *Mann* of "California's limited post-plea appellate procedures" called a "critical distinction" by respondent, brief, p. 6, received no attention in both Ninth Circuit opinions in the result. Since *Mann* followed *Richardson* and *Tollett,* the denial by this Court of certiorari is not the path this

Court should follow in the instant case where the Second Circuit stubbornly adheres to the availability of federal habeas corpus following a guilty plea despite the above cases relying upon a "critical distinction" in *Mann* to which the Ninth Circuit paid no attention.

The case of *Blackledge* v. *Perry*, —— U.S. ——, #72-1660, 42 U.S. Law Week 4761 (May 20, 1974), further illustrates how respondent's position, brief, pp. 5-6, and the decision below, petition, pp. 7a-11a, rest upon an erroneous interpretation of this Court's rulings in *Tollett* v. *Henderson, supra; Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson, supra* and *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

In *Perry*, this Court refined the rules set forth in *Tollett* and the *Brady* "trilogy" by permitting a defendant convicted upon his plea of guilty to raise in a habeas corpus proceeding a due process claim which barred the prosecution. However, it reiterated the doctrine that, except for claims related to the validity of the plea itself, federal habeas corpus was otherwise precluded, 42 U.S. Law Week at 4764.

The *Perry* decision further demonstrates the importance of the instant case. If the *Tollett* and *Brady* rules are not to be watered down then the Court below has, in a significant way, deviated from the law as set down by this Court. On the other hand, if the suggestion in the dissenting opinion, at 42 U.S. Law Week 4765, that a number of exceptions to these rules may exist is well taken, the instant case is an appropriate one for this Court to further explore an important unsettled area of the law.

The Second Circuit has acknowledged that the question raised here "is of large consequence both to the State of New York and to the federal courts." *United States ex rel. Molloy* v. *Follette*, 391 F. 2d 231, 232 (1968). This was before this court reversed that court's decision in *McMann*

which was then pending. The adherence of the court below to its view in contrast to that of the Ninth Circuit in *Mann* can scarcely be defended by the effort of respondent here to contend that the *Mann* court has not rendered a decision in direct conflict with that in the present case.

In view of the above cases we submit that this Court in the interest of the uniform administration of justice as to the availability of federal habeas corpus, should grant certiorari and summarily reverse the disposition below.

Dated: New York, N. Y., May 31, 1974.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Petitioner, Pro Se

Samuel A. Hirshowitz
First Assistant Attorney General

Robert S. Hammer
Assistant Attorney General
of Counsel